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In the Supreme Court of the United States

October Term, 1947.

HOWARD P. ROOT and RAY THOMAS, Individually and as Business Agent and President, Respectively, and as Representative Members of Meat Cutters and Butcher Workmen of America Local Union No. 576, and Other Unnamed Members of Said Union, *Petitioners,*

vs.

FRED WOLFERMAN, INC., a Corporation, *Respondent.*

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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SUBJECT INDEX OF THE MATTER IN THE BRIEF.

PAGE

Issue here involved and question presented herein..... 1

Respondent's statement of the "issue herein" is incorrect 1

The true issue here is whether constitutionally a state may enjoin peaceable picketing in a labor dispute for a lawful purpose when and because such picketing would "affect, destroy, or interfere," with the conduct of the employer's business in the usual and ordinary manner 2

What the lower court did herein and the scope of the injunction issued in the nisi prius court which was acquiesed in by petitioners 3

What the Supreme Court did and herein that the Supreme Court broadened the injunction so as to prohibit peaceable picketing in a labor dispute for a lawful purpose if and when such picketing affected, destroyed or impaired the conduct of the business 4

Peaceable picketing by a labor union for the purpose of informing the public that given employees are non-union is for a lawful purpose 5

This is not a case where lawful and unlawful purposes have been so intermingled that the lawful purposes cannot be separated from those unlawful..... 6

The fact that peaceable picketing may seriously interfere with the conduct of the business does not of itself change otherwise lawful picketing into illegal conduct 7

The court should exercise its discretion to the end, issuing the writ of certiorari 8

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ARGUMENT IN OPPOSITION TO RESPONDENT'S BRIEF.

I.

Issue here involved and question presented thereby.

(Unless otherwise indicated, page references are to the printed record.)

Respondent's statement of "the issue here" is unmistakably and demonstrably incorrect. Respondent says

that the issue is the "form of the final decree" enjoining Petitioners from picketing for "proven unlawful purpose," i. e., (a) pressing the employer to induce his employees to join the union and (b) to sign a contract with the union, which was not the lawful bargaining agent for the employees (Respondent's Brief 1-3). In our judgment, no statement of the issue could well be further from the mark. There is no issue here, nor was there in the Supreme Court of the state, as to the form or substance of the injunction restraining picketing for the specified unlawful purpose. That judgment of the *nisi prius* court is a finality made so by Petitioners' failure to appeal or otherwise draw it in question.

The true issue here is:

(a) Whether constitutionally a state may enjoin peaceable picketing in a labor dispute for a lawful purpose when and because such picketing would "affect, destroy, or interfere" with the conduct of the employer's business in the usual and ordinary manner (139-146). *See note.*

(b) Otherwise put: May a state restrict freedom of speech, as exemplified by peaceable picketing in a labor dispute for a lawful purpose, to cases where such picketing does not "affect, destroy, or interefere" with the conduct of the business in the usual and ordinary course thereof?

(c) Again clear light upon the issue is shed in this wise:

If this Court does not interpose and the Missouri decision stands, then, in the State of Missouri, constitutional freedom of speech, as applied to peaceable picket-

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Note: The fact that the condition was restricted to non-interference with receipt and delivery of merchandise is of no moment. If the state may condition such freedom of speech upon absence of ill effect upon receipt and distribution of merchandise it could condition the right with respect to any phase, or all phases, of the business.

ing in a labor dispute for a lawful purpose, is in part lopped off, truncated, abridged. Missouri courts may, consistent with the decision in this case, impose, not only the condition here imposed, but also other conditions to lawful picketing, rendering such constitutional right less effective or totally ineffective. That is *the* issue. It directly affects the whole gamut of relationship between employer and employee. It is of that importance which seemingly demands a decision of such question by the Supreme Court.

II.

What the Lower Court Did.

The lower court did enjoin picketing for each and all of the asserted unlawful purposes. That court found as a fact that the unions had renounced any right to picket for such purposes (117), although the Supreme Court said that it could find no such renunciation in the record (142). This is of no consequence. The lower court's injunction was not based upon renunciation, but upon the ground that picketing for the alleged purposes was unlawful. Whether Petitioners renounced the right to picket for said purposes before the injunction was granted is immaterial by reason of the fact that Petitioners acquiesced in such injunction, did not seek by new trial, appeal, or otherwise to draw in question either the form or substance of the decree enjoining them. That injunction was affirmed by the Supreme Court without objection by Petitioners; it is final and subject to enforcement by the effective processes of equity.

III.

What the Supreme Court Did.

The Supreme Court affirmed the injunction in form and substance as had been granted below. The injunction of the *nisi prius* court fairly met each alleged unlawful purpose and effectively enjoined picketing for any and all such unlawful purposes. It did not enjoin picketing for any lawful purpose. The latter court stated:

> "The court believes that the Defendants, if denied the right to picket for the purpose for which they have assured the court they desired to picket (which was 'to picket at the Plaintiff's stores for the purpose of informing the public of the failure of said meat cutters and butcher workmen to join said local union' (118)) as herein stated, would be restraint in their right of free speech as guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by Paragraphs 8 and 29 of Article I of the Constitution of the State of Missouri" (122).

That is, the injunction by the *nisi prius* court, rigidly confined itself to the specified unlawful purposes.

But the Supreme Court went beyond such scope and added a paragraph to the injunction as issued below, dealing with the right to picket for a lawful purpose, and prohibiting such picketing for a lawful purpose if such picketing would affect, destroy or interfere with the conduct of the business in the usual and ordinary course. The Supreme Court wrote into the injunction a prohibition, as follows:

> "From establishing *any* picket line or lines in and about Plaintiff's stores or places of business which would *affect*, destroy, or interfere with the receipt and delivery of merchandise to and from Plaintiff's

stores and places of business in the usual and ordinary course of business'' (138, 139). (Emphasis ours.)

It is manifest that this additional injunctive paragraph was not confined, nor was it intended to be confined, to picketing for unlawful purposes, but on the contrary, extended to picketing for lawful purposes where the results thereof were as specified in said order.

From all of which we submit that it is exceedingly clear that the question here is the constitutional power of a state to place such limitation and *abridgement* upon the right of peaceable picketing for a lawful purpose in a labor dispute.

IV.

Peaceable picketing by a Labor Union, for the purpose of informing the public that given employees are non-union and to induce such non-union men by proper means to become members of the union or to obtain by lawful means a majority of the employees as a bargaining agent, is for a lawful purpose. Enjoining such picketing is a denial of constitutional right.

This subject is dealt with in the brief supporting the petition, pages 15 and following. Apparently respondent does not controvert this postulate. Seemingly the cases of *Yoerg Brewing Company* v. *Brennan* and of *Park and Tilford* v. *International Brotherhood* (Petitioners' Brief, 15), together with the cases and authorities cited in the opinions in said cases are conclusive.

V.

This is not a case such as the milk wagon drivers' case (312 U. S. 287) where lawful and unlawful purpose and violence has, through the years, been so intermingled that the lawful purposes cannot be separated from those unlawful.

In the Milk Wagon Drivers' case, there had been long, systematic and approved acts of violence accompanying picketing so that, the Supreme Court held, if picketing continued, it still carried with it, the momentum of fear generated by past violence, which would survive even though future picketing might be peaceful. This is no such case. The defendants did renounce unlawful purpose, at least, by acquiescing in the injunction which restrained picketing for such unlawful purposes. There has been no intermingling of lawful and unlawful purposes since the injunction was granted. Picketing began October 16, 1946 (8). The restraining order was issued October 18, 1946 (18). There has been *no* picketing since that date. That restraining order continued in full effect until the lower court issued its final injunction on September 18, 1947 (135). The lower court's injunction continued in effect by order of the Supreme Court and the same is in effect today, April 21, 1947 (135).

It must be assumed that the injunctive order against picketing for unlawful purposes will be obeyed or enforced. The injunction by the *nisi prius* court was couched in language clear and sufficient to prevent any picketing for an unlawful purpose. There was no occasion for the Supreme Court to add any clause thereto in order to protect plaintiff's rights against unlawful picketing. The only purpose of the addition of these clauses was, to prohibit lawful picketing if such picketing resulted in affecting, destroying, or interfering with the conduct of the busi-

ness in its usual and ordinary course. Such addition has been effective to that end. Petitioners could not, under this injunction as finally written by the Supreme Court, place a picket for a lawful purpose without being in contempt of court, if the placing of such picket affected, destroyed, or interfered with the conduct of the business in its usual and ordinary course. The standard set by the Missouri Supreme Court was not lawful or unlawful purpose, but was whether the picketing affected, destroyed, or interfered with the conduct of the business, in its usual and ordinary course. Can the court adopt that standard without violating Petitioners' constitutional rights? That is this case.

VI.

The fact that peaceable picketing may seriously interfere with the conduct of business and may work apparent hardship to the employer, does not change otherwise lawful picketing into illegal conduct.

Petitioners' argument, together with authorities upon this proposition are found on pages 19 and following of Petitioners' brief. That argument and authorities seem to have been persuasive as regards respondent's position, because respondent says (Respondent's Brief, page 2):

> "Respondent has never contended, nor will it be contended here, that the purpose of the picketing was unlawful because it interfered with and damaged respondent's business. The effect of a picket line on respondent's business has absolutely nothing to do with whether the picketing was for a lawful purpose" (Respondent's Brief, page 2).

VII.

The Court should exercise its discretion to the end of issuing the writ of certiorari.

This is an earnest appeal by members of a labor union for protection by the Supreme Court of their constitutional right of freedom of speech and of the press and of assembly, under Amendments 1 and 14 to the Constitution of the United States. The question is of utmost gravity. A court must consider with anxious care whether a challenged act materially impairs the fundamental freedoms, not created by the Constitution, but preserved therein, which freedoms inhere in free men living under free government.

So far as we are advised, *no* case can be found where *any* court has put such a limitation as here, upon the constitutional right peaceably to picket in a labor dispute for a lawful purpose. The decision, if permitted to stand, will be the law of Missouri as pronounced by its highest court. Whether such decision should stand, we submit should be decided by this Court, and to that end the writ of certiorari should issue.

This Court, in *Grosjean* v. *American Press Co.* (297 U. S. 233, 56 S. Ct. 444), has, in as clear language as can be found, stated the importance of such an application as is here presented.

That case involved a state tax and license provision upon and concerning the printing of newspapers and magazines. Regarding a claim that the same deprived the parties of their constitutional freedom of speech and of the press, the court said:

> "The first point presents a question of the utmost gravity and importance; for, if well made, it goes to

the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law abridging the freedom of speech or of the press.' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process of law clause of the Fourteenth Amendment'' (267 U. S., l. c. 243, 56 S. Ct., l. c. 446).

Respectfully submitted,

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